

**Stanper Food Corporation and United Food and Commercial Workers, Local 342-50, AFL-CIO. Case 29-CA-14350**

August 12, 1991

**DECISION AND ORDER**

BY MEMBERS DEVANEY, OVIATT, AND  
RAUDABAUGH

On March 8, 1991, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record<sup>1</sup> in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions and to adopt the recommended Order, as modified.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Stanper Food Corporation, Mineola, New York, its officers agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(b).

“(b) Harassing employees, discharging them, or otherwise discriminating against them because of their activities on behalf of the Union.”

2. Substitute the attached notice for that of the administrative law judge.

<sup>1</sup>The Respondent, in its cover letter accompanying its exceptions, has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

<sup>2</sup>The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

**APPENDIX**

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

304 NLRB No. 12

WE WILL NOT threaten our employees with discharge or other reprisals in retaliation for their joining or supporting United Food and Commercial Workers, Local 342-50, AFL-CIO or any other labor organization.

WE WILL NOT harass, discharge, or otherwise discriminate against our employees, because of their activities on behalf of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole Gary Cornelius, Jeffrey Guzzo, John Tranquada, Vincent DeHart, and Edward Michaels, with interest, for any loss of earnings they may have suffered as a result of our discrimination against them, and we will offer them full and immediate reinstatement to their former jobs, or if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges.

WE WILL expunge from our files any reference to the termination of Cornelius, Guzzo, Tranquada, DeHart, and Michaels, and will notify them, in writing, that this has been done and that evidence of this unlawful action will not be used as a basis for future personal action against them.

**STANPER FOOD CORPORATION**

*James P. Kearns, Esq. and Kevin R. Kitchen, Esq., for the General Counsel.*

*Abraham Borenstein, Esq. (Bloom, Borenstein & Hess), for the Respondent.*

**DECISION**

**STATEMENT OF THE CASE**

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me in Brooklyn, New York, on August 22 and November 8, 1990. The complaint and notice of hearing herein, which issued on December 1, 1989,<sup>1</sup> was based on an unfair labor practice charge filed on September 22 by United Food and Commercial Workers Union, Local 342-50, AFL-CIO (the Union). The complaint alleges numerous violations by Stanper Food Corp. (Respondent), by Ivan Persky, its president, and Larry Bergen and James McGowan, its admitted supervisors. It is alleged that on about September 13, Respondent harassed employee Vincent DeHart by subjecting him to closer supervision and unmerited criticism of his job performance; on about September 18 and 19, by Persky, indicated to employees that seeking representation by the Union was a futile act; and on about September 18, by McGowan, threatened its employees with discharge or other unspecified reprisals if they joined, supported or assisted the Union. The principal allegation is that on September 18 Respondent locked out its employees and later that same morning, dis-

<sup>1</sup>Unless indicated otherwise, all dates referred to herein relate to the year 1989.

charged the following of its employees: John Tranquada, Edward Michaels, Gary Cornelius, Jeffrey Guzzo, and DeHart, because of their support for, and activities on behalf of, the Union. These actions are alleged to violate Section 8(a)(1) and (3) of the Act.

On the entire record, including the brief received from counsel for the General Counsel,<sup>2</sup> I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

Respondent admits, and I find, that it is a New York corporation with its principal office and place of business located in Mineola, New York (the facility), where it is engaged in the operation of a wholesale food processing and distribution center and warehouse, providing meats and other food products to grocery chains, restaurants, and other retail outlets in the New York metropolitan area. During the past year, in the course and conduct of these business operations, Respondent purchased and received at the facility meat and other food products, goods, and materials valued in excess of \$50,000 directly from points outside the State of New York. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

##### II. LABOR ORGANIZATION STATUS

The evidence establishes that the Union represents employees for collective-bargaining purposes and has numerous collective-bargaining agreements with employers in this regard. In addition, employees participate in the Union's affairs as shop stewards and through its committees. I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

##### III. THE FACTS

As stated above, Respondent operates a wholesale meat and food facility. The employees involved herein are warehouse employees or stock pickers. They pick up a written order, go throughout the facility (including the refrigerator and freezer) filling the order until it is complete and then go to the next order. Because Respondent's customers are primarily "middlemen" who supply food products to stores and restaurants, they work early hours: 4:30 a.m. to 1 p.m. During the period in question Respondent employed seven warehouse employees—the five alleged discriminatees and two others who, apparently, did not sign cards for the Union and are not involved. The only others who are involved are Persky, the boss, and Bergen and McGowan, admitted supervisors and agents.

Prior to the events Respondent's warehouse employees were unrepresented. Cornelius testified that in August, while he was working outside of the facility, he was approached by Peter Laureano, organizer representative for the Union, who asked him if the warehouse employees were represented

by a union and he said that they were not. Laureano gave Cornelius his business card and said that if they were interested in a union he should call him. On about August 22, Cornelius spoke to the other employees about the Union usually at lunch at a nearby location owned by Respondent. The employees named here said that they were interested; the other two said that they were not interested. Cornelius then called Laureano and arranged to have a meeting at the Union's office on August 26. Cornelius, DeHart, and Tranquada attended this meeting and signed authorization cards for the Union. Michael's card is dated August 28; Guzzo's card is dated September 6. Cornelius testified that about a week after he signed his union card, at about 2:00 he asked Persky if he could go to lunch, Persky said: "Oh yeah, we've got to stop everything . . . this is a union shop, we've got to have a coffee break." Persky testified that he never made this statement.

The initial allegation only involves DeHart, who had been employed by Respondent since September 1988, and allegedly occurred on about September 13. He initially testified that early that day Persky told him that he was working too slow, although he testified that he was working at his regular rate. DeHart told Persky that he would work faster. At that point, Bergen approached him and told him that he was working too slow and that he would not mess with him that day. DeHart said that he was working at his regular pace and Bergen said that he was not in for his "shit" that day. DeHart felt that he was being backed into a corner and left the facility for the day. Later that day he asked Bergen if he could return to work and Bergen told him to report the next morning, which he did. When he was questioned about this incident at the second day of hearing by counsel for Respondent DeHart testified that it was only Bergen, not Persky as well, who told him that he was working too slow. However, his affidavit states that Persky did warn him that day about working too slowly. Persky testified that DeHart's leaving on that day was the result of a "misunderstanding"; DeHart was outside taking an order from a customer and got into an argument with the customer. Bergen intervened and DeHart threw his order sheet down and left for the day. Bergen testified that on the day in question DeHart got into a shouting match with a customer and pushed the customer. Bergen got between them before it got any worse. Bergen told DeHart that he could not do that; DeHart walked out. Later that day he called and asked if he could return to work the following day. Bergen said that he could, and he did.

As stated above, the warehouse employees generally begin work at 4:30 a.m. Admittedly, on September 18, at about 5 a.m. Respondent told the employees to leave the warehouse and locked the gates to the facility for about 15 minutes to a one-half hour, at which time the employees returned to work. Apparently, they were not docked any pay for the time they were out. Cornelius testified that when McGowan was reopening the gates he asked him what was going on and McGowan told him: "If I were you guys I would start looking in the want ads." DeHart testified that he asked McGowan why the gate was being closed and he said that Persky had told him to lock the gate and they were not to return until he reopened the gate. He testified that prior to that incident, the only occasion that Respondent would lock the gate was when all the employees left together for lunch. Guzzo testified that this was the first time the gates were

<sup>2</sup>The briefs in this matter were due on December 13, 1990. By request dated December 13, 1990, counsel for Respondent requested additional time in which to file its brief; counsel for General Counsel opposed the request. On that date I informed the office of Respondent's counsel that its request was denied as untimely. This request was also denied by letter dated December 18, 1990. As Respondent's brief was received on December 17, 1990, it was neither read nor considered.

locked when he reported for work; he had been employed by Respondent since about May.

Persky had been away the prior weekend (September 18 was a Monday) and had not been at work on Friday. He and Bergen testified that on the morning of September 18, when he arrived at the facility, he went to the upstairs office (as compared to the downstairs office with the windows through which the warehouse employees take their orders, which relates to Respondent's defense herein and will be discussed more fully below) where Bergen greeted him and informed him of what occurred on Friday in his absence. Persky testified that he wanted to have McGowan present during the conversation, so he told McGowan to come to the upstairs office, but to first have the employees leave the facility and lock the gate. He did this because there were no other supervisors downstairs and "we can't leave everybody by themselves downstairs." In an affidavit that Persky gave to the Board he stated: "I am not aware of my supervisors locking any warehouse workers out of the work area on September 18, 1989." During this discussion in the upstairs office between Persky, McGowan and Bergen (after the gates had been locked) Bergen told Persky that "there was some talk of a union going to take place or I can't recollect what the exact words were." Persky testified that he said that he really did not care. Shortly thereafter he sent McGowan downstairs to let the employees back into the facility. He testified that the gates had previously been locked on "numerous occasions," whenever there was no supervisor present.

Bergen (who has been employed by Respondent for 9 years) testified that the gates are closed two or three times a day; if either he, McGowan or Persky is not present to be at the front door, they close the gates, "two or three times a day, at least." He testified: "It's constantly opened and closed." He meets with Persky every morning; when Persky has been absent from the facility, such as the situation herein, the meetings are even more important. In the past, they have had these meetings in both the upstairs and downstairs offices. The downstairs office is "right in front of the door. We can see everything that's going on," so it is not necessary to lock the gates. If they meet in the upstairs office they cannot see the employees so they have to lock the gates. As to what determines whether they meet in the upstairs or downstairs office, he testified: "It depends when I catch his attention." On the morning in question, Bergen was taking messages off the recorder, which was located in the upstairs office, when Persky came in so they remained there for the meeting and told McGowan to lock the gates and join them. As to why they did not meet in the downstairs office instead, he testified: "I mean leave the room, lock the office, go downstairs. It just seemed like an awful lot of stuff to do. It was just a lot easier to say, come on guys. Step outside for a couple of minutes and Jimmy run up the stairs and it would be a short brief thing." He told Persky of business developments on Friday and that on Friday somebody told him that the employees were speaking to someone from the Union; he testified that Persky said: "I don't really give a shit."

The next allegation refers to action taken against DeHart later that morning. Both as to this allegation, and the allegation that follows regarding the termination of the other four employees Respondent's principal defense is that the employees were sent home for the day because they were look-

ing through the office window in order to annoy Persky. The downstairs office has a desk at which Persky and an office employee sit. In front of this desk is a sliding glass window. When the employees are ready to pick an order, they slide the window open, take the order, close the window, and pick the order. Apparently, the window is also Persky's means of seeing what is happening in the warehouse. Persky and Bergen testified that the employees are told not to look in the window at Persky and, on September 18, they all did so in order to annoy him and that is why they were sent home for the day.

DeHart testified that about 15 minutes after the gates were reopened, Persky told him that he did not like his attitude and he did not like the way he looked at him and to stop looking at him; "he just started yelling at me and I just walked off." About an hour later, he took an order from the window and started to fill it when he noticed that it was a two-page order and he only had the first page. He went back to the window to get the second page of the order and Persky slammed the window closed and told DeHart to go outside. When they got outside, Persky said: "I don't like your looks; I don't like your attitude. You're fired. Go home." DeHart said that he had to go upstairs to get his personal belongings. Persky would not allow him back into the building and sent Bergen to get DeHart's belongings. He testified that he did not call the next day to ask if he could return: "I was told I was fired so why should I go back and ask for my job back." DeHart testified that Persky never warned him about looking in the window and neither Persky, nor the supervisors, had previously warned him about his attitude.

Persky testified that at about 6 a.m. that day Bergen told him that DeHart was not working to his usual ability and he had given him a warning and told him to work faster. About a half hour later DeHart began looking through the office window where he was sitting. Persky told DeHart to "stop kidding around or whatever he was doing . . . and get back to his normal working procedures." DeHart said he would and Persky returned to his office. He testified:

He continued to look at me and at that point when he continued to stare at me on a constant basis while he was preparing his orders, I went out and I told Vinnie that's it for the day, you can't work anymore because I can't work with someone who's on an eye to eye basis in that small office. I feel like I'm going to be threatened.

Persky testified that he did not fire DeHart; he told him to go home for the day, which is the usual punishment for looking in the office window, and he thought that DeHart would return the next day to work. He did return the next day, but like the other employees sent home that day (except Michaels) they returned the next day to picket the facility.

Bergen testified that at about 6 a.m. that day, while he was about 20 feet from DeHart, in the area across from the office, he observed that while DeHart was pulling an order, he was making "eye contact" with Persky in the office. Both Bergen and McGowan told him to stop it and return to work. DeHart went back to work, but seemed to be intentionally making eye contact "and just being a nuisance." Persky yelled through the window for DeHart to get back to work.

A few minutes later the same situation occurred, and Persky came out of the office and said: "Listen Vinnie, if you're going to do what you're doing, get back to work." DeHart threw up his hands and said: "I've had enough of this shit" and left the facility.

The principal allegation here is that shortly after DeHart was sent home Respondent discharged Tranquada, Michaels, Cornelius, and Guzzo, also because of their activities on behalf of the Union. Cornelius testified that at about 10:15 that morning he, Tranquada, Michaels and Guzzo were told by (he believes) McGowan to go outside. Persky, Bergen, and McGowan were there as well. Persky pointed to each of the employees and said to each: "Go home." Cornelius asked why, and Persky said that there was no work. Cornelius asked: "What about tomorrow?" Persky said: "We'll see." Persky then said: "Go down the block. Your buddy's waiting for the vote." The work week at the facility is Monday through Friday. Cornelius testified that prior to the DeHart situation earlier that morning he had never seen an employee at the facility being told to go home. He also was not aware of a policy at the facility that when you're told to go home one day you are supposed to report for work the next day. Like DeHart, Guzzo, and Tranquada he picketed the facility the next day.

Tranquada testified that while he was doing orders with Cornelius ("There was a lot of tickets to do.") McGowan approached them and said: "Go home. There's no work today." As he and the other three individuals were walking out of the facility Persky pointed to each of them and said: "Go home. No work." Cornelius asked Persky if there would be work on the following day and he shrugged his shoulders and raised his hands like he did not know. As they were walking away, Persky said: "Say hello to the union guy and don't forget to vote yes." He testified that he knew of no practice at the facility that employees who were disciplined and sent home were to return to work the next day. He also testified that during his employment at Respondent (only 3 months) he was never told that there was a rule that employees were not to look in the office window, although Persky once came out of the office and told him not to look in the window.

Guzzo testified that on that morning Persky pointed to him and said "him" and McGowan took away his work papers (he was picking orders at the time) and said: "Go home, there's no work today." He also saw Persky point to Tranquada, Cornelius, and Michaels and say "him." Guzzo and the three other employees then walked out of the facility with Persky behind them; he heard Persky say: "Go see your friend down the block now." He asked McGowan what was going on and McGowan told him to get in touch with him later; he did not. He testified that he was not looking through the office window that morning and that he had not been told that morning not to look through the window. He also testified that Persky was upset for the entire morning. He knew of no policy at the facility that if you are sent home for the day you always return the following day.

Michaels testified that on that morning he and the other three alleged discriminatees were told to go outside; when they got outside (Bergen, McGowan, and Persky went with them) Persky told them that there was no work and they should go home, which they did. The other two warehouse employees were not called outside and were not sent home.

That afternoon he called McGowan and asked if he could have his job back ("I was getting married and I needed this job") and McGowan said that he would talk to Persky about it. He returned to work the following day and worked almost a year for Respondent; during this period he did not observe any employees being sent home. He was not aware of any practice at the facility where if you are sent home you return to work the following day; he is also not aware of a "standing rule" at the facility that you are not to look into the office window, although he had been told by McGowan several times not to look into the window.

Persky testified that on that morning the four alleged discriminatees "came to the front window, looked into the window with a smirk or a smile and walked back and did their job." He testified that "some were threatening. Some were a smart smile type face. All different types of faces to annoy me I guess." After this happened once, Persky told McGowan to explain to the men that they should get back to work and "stop kidding around." About 15 minutes later three of the employees did it again—opened the window and stared at Persky. After that, Persky left the office and told the employees to "stop the nonsense"; that what they were doing was annoying and threatening, and he could not work with someone who was constantly threatening him. When the employees looked in the window for the third time he told McGowan to send them home. McGowan took them outside and told them to go home. He assumed that they would return to work the next day; only Michaels did. He testified that he never told the employees: "Your buddies down the block, go vote," or words to that effect. In an affidavit that Persky gave to the Board, he stated that after McGowan told the employees to stop making faces at Persky the employees walked out.

Bergen testified that on that morning, after DeHart left, the other alleged discriminatees began doing the same thing that he had done—staring at the office, trying to make eye contact and "just trying to be annoying." Both he and McGowan told them to stop doing it; they asked him: "What's the big deal?" He told them: "You're bothering the boss, cut it out." This continued on a number of occasions and "there was really no other alternative but to tell them if you're not going to do what we ask you to do, go home for the day and we'll give it another shot tomorrow." About an hour later, Michael's wife called him and asked what was going on. He told her that if Michaels reported for work the following day he would be put to work; he did and he was. He testified that during his employment with Respondent, on three or four occasions employees have been sent home and reported for work the following day.

Persky testified that Respondent's rule prohibiting employees from standing in front of, and looking in, the office window is for his privacy, as well as his secretary and his customers. The first violation results in a warning not to look in the window. If it is repeated the employee is told to go home for the day, with the expectation that he will return the next day. As to whether employees have ever been sent home for this, he testified: "On several occasions." However he could name only one such employee, and that occurred in June 1990.

Cornelius testified that during the week prior to their termination he saw about 12 job applicants waiting outside the facility for an application. He asked one of these individuals

what he was doing there and he said that there was an ad in the paper for warehouse work and he wanted to fill out an application. DeHart also testified that he saw a lot of people waiting to fill out job applications the week before he was terminated. At one point when Bergen was busy he asked DeHart to give someone a job application. DeHart asked Bergen why he was accepting applications and Bergen said that there were going to be some changes at the facility; some people were going to be fired and others were going to be hired to take their place. Tranquada and Guzzo also testified that for the week prior to their termination, a lot of individuals came to the facility asking for job applications; the large number of applicants was unusual. General Counsel moved into evidence a "help wanted" ad from the September 15 edition of *Newsday*; it [asked] for warehouse employees and the job description contained in the ad matches the job the employees involved herein performed. Cornelius, Guzzo, DeHart, and Tranquada each testified that they obtained their employment at Respondent through a similar ad in *Newsday*; Michaels was not asked how he obtained his employment with Respondent.

Persky testified that Respondent regularly places ads in newspapers for employees because of the high turnover of employees and the September 15 ad in *Newsday* was a usual such ad and was unconnected to the employees' union activity. The record establishes that Respondent placed similar ads in *Newsday* in January, February, March, April, June, and the end of September, in addition to the September 15 ad discussed above. In addition they placed a similar ad in the *Daily News* in April.

#### IV. ANALYSIS

There are no difficult issues of law here, only difficult credibility questions. If I believe General Counsel's witnesses, Respondent has violated the Act as alleged. If I believe Persky and Bergen the complaint should be dismissed in its entirety. Initially, I found Bergen and General Counsel's witnesses to be, apparently, credible witnesses. A more thorough examination of the record, however, convinces me that General Counsel's witnesses should be credited over Persky and Bergen.

The "heart" of the complaint is the September 18 termination of Cornelius, DeHart, Guzzo, Tranquada, and Michaels. General Counsel alleges that it was caused by their union activity over the prior 3 weeks. Respondent, while admitting that it learned of their union activity a few days earlier, defends that they were sent home for the day for looking into the office window and staring at Persky. While at first glance this may seem to be a preposterous defense, my observation of the witnesses and a close examination of their testimony makes this defense seem entirely possible. The testimony establishes that Persky had extreme mood swings and, at times, appeared nervous; in the situation herein it is entirely possible that the employees purposely attempted to annoy him by looking through the office window and making faces at him, knowing how he would react. However, the overall record convinces me that this was not so. As stated above I found General Counsel's witnesses to be, generally, very credible. The only exception was DeHart who, while not incredible, was too certain of the facts to be as credible as the other employees, who were more willing to admit an occasional uncertainty; after all, the events had occurred a

year earlier. I was not impressed with Persky as a witness and more important there were major conflicts between his testimony and the affidavit he gave to the Board. There is a substantial difference between the employees leaving after McGowan told them to stop looking in the window (as he stated in his affidavit) and his sending them home for looking in the window (as he testified to).

There are other factors as well supporting the credibility of General Counsel's witnesses. The record establishes that Respondent advertises in the newspapers for employees, principally warehouse employees. General Counsel established that on September 15 (3 days before the termination herein) Respondent placed an ad in *Newsday* for warehouse employees. In an attempt to rebut this testimony, Respondent presented evidence of additional ads it placed seeking employees; however, although these ads appeared regularly in 1989 through June, there were no such ads between June and the September 15 ad. Respondent also never specifically explained the need for the September 15 ad (other than the general turnover defense) when it apparently had a full crew on that date and even after it lost four of these employees (it terminated the five and Michaels returned) it only hired two employees to replace them. Additionally, I found Persky and Bergen's testimony regarding the 5 a.m. lockout totally unconvincing. If they were concerned about security with all supervisors at the meeting, they could have had the meeting in the downstairs office, while watching the employees and maintaining production. Instead, they had the meeting in the upstairs office (for no satisfactory reason) and sent all the employees outside for 15 to 30 minutes. Further, I also credit the testimony of Cornelius, Guzzo, and Tranquada that after Persky terminated them he made a statement to the effect of "Go see your friend down the block"; this could relate only to the Union. The only support for Respondent's position is that Michaels called Respondent later in the day on September 18 and got his job back. However none of the employees, even Michaels, testified to being aware of a policy at the facility that if you are sent home one day you return the next. In fact, Michaels testified that when he called Bergen to ask if he could have his job back, Bergen had to speak to Persky before telling him to come back. For all these reasons I credit General Counsel's witnesses over Persky and Bergen.

Based on these findings it is clear that General Counsel has sustained his burden under *Wright Line*, 251 NLRB 1083, and that Respondent has not satisfied its burden. The lockout and subsequent discharge of Cornelius, Guzzo, Tranquada, Michaels, and DeHart (who was terminated a little earlier that morning) therefore violates Section 8(a)(1) and (3) of the Act. On the basis of the September 15 *Newsday* ad (as discussed above), McGowan's statement to Cornelius that there were going to be some changes at the facility with some people being fired and others hired, and Persky's statement to Cornelius about a week before their termination that they had to stop everything and have coffee because it was a union shop (which I credit), I find that Respondent was aware of the employees' union activity prior to the September 13 incident with DeHart and that its harassment of DeHart on that date violates Section 8(a)(1)(3) of the Act under the *Wright Line* guidelines.

There remains for consideration the 8(a)(1) allegations; the complaint alleges that on about September 18, Respondent,

by McGowan, threatened its employees with discharge and other unspecified reprisals, if they joined, supported, or assisted the Union. Cornelius testified that when McGowan opened the gates for the employees to return to work after the lock out on the morning of September 18, he asked McGowan what was going on and McGowan said: "If I were you guys I would start looking in the want ads." As stated above, I found Cornelius to be a very credible witness; McGowan did not testify. I therefore find that this statement violates Section 8(a)(1) of the Act. The only remaining allegation is that on September 18 and 19 Respondent, by Persky, indicated to employees that seeking representation by the Union through the Board processes was a futile act. Counsel for General Counsel did not brief this final issue and I am uncertain as to what it refers. Regardless, any finding in regard to this issue would be cumulative and I therefore recommend that this allegation be dismissed.

#### CONCLUSIONS OF LAW

1. Respondent Stanper Food Corp. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) and (3) of the Act by harassing employee Vincent DeHart on about September 13 because of his activities on behalf of, and support for, the Union.
4. Respondent violated Section 8(a)(1) and (3) of the Act by locking out, and subsequently terminating its employees DeHart, Gary Cornelius, Jeffrey Guzzo, John Tranquada, and Edward Michaels on September 18 because of their activities on behalf of, and support for, the Union.
5. Respondent violated Section 8(a)(1) of the Act by threatening its employees with discharge for joining or supporting the Union.
6. Respondent did not violate the Act as further alleged in the complaint.

#### REMEDY

Having found that Respondent has engaged in, and is engaging in, certain unfair labor practices, I recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. In this regard, I shall recommend that Respondent offer Cornelius, Guzzo, DeHart, and Tranquada reinstatement to their prior positions of employment and to make them whole for any loss they suffered by reason of their termination. If Michaels lost any pay by reason of his 1-day termination, he shall also be made whole. Persky testified that beginning in about June 1990 he ceased employing warehouse employees. At that time he began using the services of an employment agency to supply warehouse employees; he calls the agency with the number of employees he needs the following day and they appear at 4:30 a.m. the next morning. I leave for the supplemental proceeding what effect this change has on their reinstatement rights and their backpay. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>3</sup>

#### ORDER

The Respondent, Stanper Food Corp., Mineola, New York, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Threatening to discharge its employees in retaliation for joining or supporting the Union.

(b) Discharging or otherwise discriminating against its employees, because they joined or assisted the Union.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

##### 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer immediate reinstatement to Cornelius, Guzzo, DeHart, and Tranquada to their former positions of employment or, if those positions are no longer available, to substantially similar positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss they suffered as a result of the discrimination in the manner set forth above in the remedy section of the decision. Michaels is to be made whole in a similar manner if he lost any wages due to the discrimination.

(b) Remove from its files any reference to the termination of Cornelius, Guzzo, DeHart, Tranquada, and Michaels, and notify them in writing that this has been done, and that this evidence of the unlawful activity will not be used as a basis for future actions against them.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Mineola, New York facility copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed as to the matter not specifically found.

<sup>3</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>4</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."